IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 34

THE SAGE STORES COMPANY, a corporation, and CAROLENE PRODUCTS COMPANY, a corporation,

Petitioners,

—*against*—

THE STATE OF KANSAS, *ex rel.*, A. B. MITCHELL (substituted as Attorney General),

Respondent.

BRIEF FOR PETITIONER CAROLENE PRODUCTS COMPANY

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There is no claim that petitioners commit any fraud or deception in the marketing of Carolene; it is admittedly wholesome and nutritious, and is sold under labels which plainly, distinctly and accurately describe its ingredients. Any resemblance between Carolene and evaporated milk results exclusively from the inherent qualities of the indispensable ingredients of the product, and not from the addition or omission of any substance for the purpose of creating a simulation. If, notwithstanding these circumstances, further protection of the public is deemed necessary, the remedy is regulation, not prohibition 24

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Preliminary Statement.

This case reaches this Court by Writ of Certiorari issued to the Supreme Court of the State of Kansas on April 10, 1944 (321 U. S. Memoranda, p. IV).

The judgment to be reviewed was rendered in an original action instituted by the State of Kansas in the Supreme Court of that state, on the relation of J. S. Parker, Attorney General. The action was brought to restrain petitioner, Carolene Products Company, from selling, in Kansas, a certain food product compounded by it, and to enjoin petitioner, The Sage Stores Company, from doing business in Kansas because it had made sales of said product. The gravamen of the action is that the selling or keeping for sale of said product is a violation of Section 65-707 (F) (2) General Statutes of Kansas, 1935.

The judgment grants the relief demanded to the extent of enjoining both defendants from selling or keeping the product for sale in Kansas (157 Kan. 404).

The testimony was taken before a Commissioner appointed by the Court to hear the proof and submit Findings of Fact and Conclusions of Law.

After the Commissioner had completed the taking of testimony and his report had been filed, Mr. Parker, the original Relator, was elevated to the Supreme Court of the State of Kansas and his successor as Attorney General, Mr. Mitchell, was substituted as Relator (R. 788).

Under the Kansas procedure, the Commissioner's Findings were merely advisory to the Court and not binding on it, once, as happened here, they were challenged. In that situation, the Supreme Court of the State of Kansas was required to ascertain the facts anew and reach its own conclusions (R. 659). The majority below did not do that; it merely noted that there was "competent evidence" in support of the assertion that the product was, in important respects, superior to evaporated whole milk and also that there was "competent evidence" that in some respects it was inferior to evaporated whole milk (R. 659-660), and, having made this observation, it concluded that the existence of this difference of opinion was itself sufficient to sustain the statute.

The Court below was divided, four to three, Mr. Justice Parker casting the deciding vote in favor of plaintiff (R. 795).

Under the practice in the Supreme Court of Kansas, the prevailing opinion is written by the Justice to whom the case is assigned for report, whether or not he agrees with the majority. Hence it is that Justice Wedell writes the majority opinion of the Court (R. 652), though he dissents vigorously from it (R. 668).

Jurisdiction.

Jurisdiction to review the judgment below is conferred on this Court by Sec. 237B of the Judicial Code as amended by the Act of February 13th, 1925.

Statement of the Case.

Despite the length of the record, the underlying facts are comparatively few.

Petitioner, Carolene Products Co. (hereinafter referred to as "the Corporation") is a Michigan corporation, neither licensed to do, nor doing, business in the State of Kansas. It produces a food compound consisting of pure pasteurized skim milk, pure refined cottonseed oil and pure high potency fish liver oil containing Vitamins A and D. The compound is known by two trade names, "Carolene" and "Milnot". We shall refer to it as "Carolene".

Petitioner, The Sage Stores Company, is a Kansas corporation, engaged in the retail sale of food products, including Carolene.

The issues raised by the pleadings are (R. 3-56; 60):

(1) Is Carolene a wholesome nutritious and properly labeled food product;

(2) Does Section 65-707 (F) (2), General Statutes of Kansas, 1935, deprive petitioners of their liberty and property in violation of the Fourteenth Amendment to the Constitution of the United States.

The statute involved (Sec. 65-707 (F) (2), Gen. Stat. Kansas 1935) reads as follows:

"It shall be unlawful to manufacture, sell, keep for sale, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or

evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives of any of them to which has been added any fat or oil other than milk fat, either under the name of said products, or articles or the derivatives thereof, or under any fictitious or trade name whatsoever."

In the hearings before the Commissioner certain of the facts were agreed upon; as to the others, testimony was taken. The relevant Findings of Fact contained in the Commissioner's Report may be summarized as follows:

(a) Carolene is manufactured in modern sanitary creameries. It is evaporated in the same manner as whole milk is evaporated in the manufacture of evaporated milk. It is placed in hermetically sealed cans, and thoroughly sterilized in the same manner as canned evaporated milk. It is rendered thereby absolutely free of all bacteria and so remains thereafter (Finding 6, R. 495).

(b) Nothing is added to Carolene to give it an artificial flavor or color or to give it a resemblance to any other food or food product (Finding 33, R. 509).

(c) Carolene is a wholesome, nutritious and harmless food product (Finding of Fact 53, R. 519). Its sole ingredients are pure skim milk, pure refined cottonseed oil and vitamins A and D (Finding of Fact 6, R. 495). Each of the ingredients is uniformly recognized as a pure, wholesome and nutritious food product (Findings of Fact 12, 13 and 16, R. 496-499). Skim milk is a wholesome nutritious food, valuable for its content of protein, carbohydrates (milk sugars), minerals and water soluble vitamins (Finding of Fact 13, R. 497). Refined cottonseed oil is a pure, whole-

some, nutritious and beneficial food suitable for human consumption, which is in general use throughout the United States as a food and food shortening and as a cooking oil and in salad dressings, oleomargarine and in the compounding of many lards (Finding of Fact 13, R. 496).

(d) The fat soluble vitamins A and D with which Carolene is fortified are obtained from prime natural sources; they are called "natural vitamins" and are equal in nutrition to vitamins supplied through butter fat or other sources (Findings 8, 16, R. 496, 499). It was not believed commercially possible to fortify foods with vitamins A and D until after 1930 (Finding 15, R. 499); now the fortification of foods with vitamin concentrates is "proper and accepted practice" (Finding 14, R. 499).

(e) Carolene has a greater constant supply of vitamins A and D than evaporated whole milk (Findings 7 and 19, R. 496, 502).

(f) There is no history of injury resulting from the fortification of foods with natural vitamins (Finding 16, R. 500).

(g) Carolene sells at about fifteen per cent less than evaporated whole milk (Finding 35, R. 510-511), and "is used principally by families in the low income group" who prefer it because • • • "it will whip • • • it is cheaper • • • it will keep longer • • • than evaporated whole milk" (Finding 38, R. 511-512).

(h) There is a shortage in this country of the food factors of skim milk. Each year almost fifty billion pounds of skim milk, concededly an excellent food,

are fed to animals or destroyed,—absolutely wasted as far as human consumption is concerned (Finding 13, R. 497).

(i) The deficiencies of the defendant's product as compared to evaporated milk are largely made up from other sources when the product is used as a substitute for whole milk or evaporated whole milk in the diet of adults who consume a varied diet; in the diet of infants and children who do not consume a varied diet, such deficiencies are not made up, and their diet is partially inadequate (Finding 53, R. 519). However, neither milk itself nor any other single food contains all the elements necessary for an adequate diet; whole milk is deficient in iron, copper, manganese and Vitamin D (Findings 19, 20, R. 502-3), and in the case of infants, pediatrists do not advise the use of even whole milk as a sole diet without modification or addition of other substances (Finding 20, R. 502-3; see also Finding 16, R. 500, and Finding 48, R. 515).

(j) In 1940, Litchfield Creamery Company, which manufactures the product for the Corporation, purchased more than two million dollars worth of whole milk from approximately 4800 dairy farmers. After making butter from the cream in the whole milk so purchased, the skim milk was used to make 1,100,000 cases of Carolene in the year 1940. It has good customer acceptance (Findings 23, 38, R. 504, 511).

On the question of possible confusion, the Commissioner made findings to this effect:

(k) The label used on the corporation's product was submitted to the Federal Food and Drug Admin-

istrator and meets all his suggestions (Finding 27, R. 507*).

(l) In the course of a period of two years, 1940 and 1941, a Deputy Dairy Commissioner called on 28 retail grocers in Kansas. In "many" of the stores Carolene was displayed "with or near" evaporated milk. The Deputy Commissioner would ask a clerk for "cheap canned milk". In "some" of the stores the clerk first recommended Carolene and in "several instances" the clerk either first recommended some brand of evaporated milk or some brand of evaporated milk and Carolene. "Many" of the clerks either informed the Deputy of the "nature" of the product or read the label to him, but "a majority" did not disclose the "nature" of the product. Three other Deputies made "surveys" in their territory during the same period and "in most instances" found that Carolene was displayed on shelves "with or near" evaporated milk (Finding 31; R. 508-9).

(m) "Most" housewives know "at least in a general way" what Carolene is. "Some" do not. "In a majority of cases" housewives call for Carolene under its trade name, but some call for it as "Milnot milk" and "some" of the retail grocers who testified so referred to it (Finding 32, R. 509).

(n) Various retail grocers have advertised Carolene in their local newspapers on their own initiative and at their own expense. In six advertisements the trade

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* The label clearly discloses the ingredients of the product; it states in bold type that the product is "not evaporated milk or cream", but is "a compound of evaporated skimmed milk, cottonseed oil, Vitamins A and D in fish liver oil" (R. 17).

name was either preceded or followed by the word "milk"*. There is nothing in the record to indicate that defendant knew of or in any way authorized or encouraged this form of advertising. On the contrary, defendant puts in the cases of its products a "Notice" stating: "It is improper to advertise, represent, display or sell either of these products as milk, or evaporated milk or cream" (Finding 34, R. 509-10).

(o) Nothing is added to Carolene to give it an artificial taste or color or to give it a resemblance to any other food or food product. Since the principal constituent of the product is skimmed milk and the cottonseed oil which is added is colorless, odorless and tasteless, the product "necessarily" closely resembles evaporated whole milk in taste, consistency, odor and appearance. The average consumer could not distinguish between them by taste, smell or appearance (Finding 33, R. 509).

(p) There would be no administrative difficulty in supervising an official examination of the compound to ascertain the uniformity of its claimed ingredients, because an accepted test, easy of use, exists for ascertaining the vitamin content of such a fortified compound (See pp. 132-134, and pp. 136-138, the Second Supplement to the Pharmacopoeia of the United States of America, 11th Decennial Revision, and the acceptance of the test there described by the U. S. Secretary of Agriculture in Finding #19 of the regulations fixing and establishing definitions and identity for evaporated milk and for concentrated milk, dated June 28, 1940).**

The majority of the Court below held (R. 660) that the statute is constitutional because, although there is no dis-

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* Copies of the advertisements appear at pages 618-622 of the Record. There were twenty-two between June 1940 and March 1942.

** Copies of the regulations will be submitted to the Court together with this brief.

agreement that Carolene is a wholesome and nutritious food, there is a "substantial disagreement" as to whether it is inferior, equal or superior to evaporated whole milk. The alleged "disagreement" on this subject, the Court held, empowered the legislature to ban Carolene absolutely if the legislature believed that dealers might sell it as milk.

A minority opinion was written by Justice Wedell, concurred in by Justices Hoch and Smith, in which the Statute is declared to be unreasonable, arbitrary and discriminatory, not justifiable as a health measure, and unconstitutional.

Specification of Assigned Errors Intended to be Urged.

In the "Specification of Errors" in their brief in support of the petition for a writ of certiorari, petitioners assigned two errors. In granting the writ, this Court limited the review to the first of them, which reads:

> "The Kansas Supreme Court erred in holding constitutional Section 65-707 (F) (2) General Statutes Kansas 1935, which absolutely prohibits the sale of Carolene, a wholesome and nutritious food product. Said section deprives the petitioners of their liberty and property in violation of the due process and equal protection of law clauses of the Fourteenth Amendment to the Constitution of the United States."

This is the error assigned and intended to be urged.

Summary of Argument.

Since Carolene is a wholesome and nutritious food product, fairly labeled and sold on its merits without fraud on the public, Section 65-707 (F) (2) General Statutes of Kansas 1935, which bars the sale of such product, is unconstitutional, in that it violates the Fourteenth Amendment to the Constitution of the United States.

The statute is arbitrary, unreasonable and discriminatory. It does not purport to state any standard of minimum nutrition. Skimmed milk may be sold, yet skimmed milk to which has been added any fat or oil other than milk fat, is barred, and this, even though the compound is more nutritive not only than skimmed milk, but than whole milk itself.

Nor does any statute prohibit the sale for human consumption of any of the edible vegetable oils, including cottonseed oil. There is no attempt to deny commerce in fish liver oil, or any of the other known sources of Vitamins A and D. There is no dispute in this record that the blending of these three nutrients provides a new source of wholesome food at low cost. That new food is Carolene. The majority of the Court below has construed the statute to prohibit its sale, even though it is a more dependable source of the ingredients of milk than whole milk itself.

The statute cannot be justified as one designed to prevent possible deception of the public. In the first place the evidence shows no such deception; secondly, if any deception were feared, the remedy lies in regulation, not prohibition, because the product is admittedly wholesome and nutritious. The absolute proscription of such a product is a violation of the due process clause of the Fourteenth Amendment.

ARGUMENT.

POINT I.

Since Carolene is concededly a wholesome and nutritious food product, fairly labelled and sold on its merits without fraud on the public, Section 65-707 (F) (2) General Statutes of Kansas 1935, which absolutely bars the sale of such product, violates the Fourteenth Amendment to the Constitution of the United States.

After issue was joined and before any evidence was adduced, plaintiff stated that it proposed to prove that the sale of Carolene should be prohibited because Carolene was not a wholesome food (R. 60). Plaintiff failed to prove that assertion and later, in the course of the trial, substituted the innuendo that Carolene "seems" not to be the nutritive equal of whole milk (R. 209). Plaintiff failed to prove even that. These inadequacies in plaintiff's proof explain the surprising rationale of the decision of the majority below, the basis of which may be found in the following excerpt (R. 660):

> "For the purpose of determining the constitutionality of the law in question it is immaterial whether we believe defendant's product when considered as a whole is inferior, equal or superior to whole milk or evaporated whole milk if substantial disagreement in fact exists with respect to the inferiority of the product as compared with whole milk or evaporated whole milk, and the legislature has some basis for believing a filled-milk product is likely to be sold or is susceptible of being sold as and for whole milk or evaporated whole milk with the result that the public may be deceived thereby" (157 Kan. 404, 412).

We shall show below that:

A. There is no "substantial disagreement" with respect to the relative nutritive value of Carolene, whole milk and evaporated milk; the record shows beyond dispute that Carolene is as wholesome and nutritious as whole milk or evaporated milk, if not more so; and

B. Since Carolene is admittedly wholesome and nutritious, it would be unconstitutional to ban its sale, even if there were "substantial agreement" as to whether or not it is inferior, equal or superior to whole milk or evaporated milk.

A.

There is no "substantial disagreement" with respect to the relative nutritive value of Carolene, whole milk and evaporated milk; the record shows beyond dispute that Carolene is as wholesome and nutritious as whole milk or evaporated milk, if not more so.

In plaintiff's "Statement of Issues Before the Commissioner", submitted prior to the commencement of the hearings, plaintiff said (R. 60):

"The State proposes to prove:

1. That the article produced and sold by said defendants in this case is not wholesome and nutritious regardless of the type of oil or fat that is substituted for butter fat."

Plaintiff made no pretense of sustaining that charge; it offered no evidence even tending to support it. The Findings are, on the contrary, that:

The sole ingredients of defendant's product are pure skimmed milk, pure refined cottonseed oil, and Vitamins

A and D (Finding of Fact 6; R. 495);

Each of the ingredients is uniformly recognized as a pure, wholesome and nutritious food product (Findings of Fact 12, 13 and 16; R. 496-499);

The combination of these ingredients, *i.e.*, Carolene, is a wholesome, nutritious and harmless food product (Finding of Fact 53; R. 519).

Failing in its announced purpose to prove that Carolene is not wholesome and nutritious, plaintiff shifted to an attempt to prove that Carolene is not as nutritious as whole cow's milk. This was an obvious dialectical device on plaintiff's part to divert attention from its failure to prove what it had previously recognized was the major premise of its argument. We shall show presently that a wholesome and nutritious product may not be banned, even if it is not as nutritious as milk. Before doing that, however, it should be noted that plaintiff was as unsuccessful in proving the contention to which it shifted, as it had been in proving the one it abandoned.

The witnesses discuss the comparative desirability of whole cow's milk and Carolene from two angles; first, in the feeding of infants, and second, in the feeding of humans beyond the infant stage.

In the case of individuals past the infant stage, it would not be a matter of moment whether they receive whole cow's milk, evaporated cow's milk, or defendant's product, because once the individual passes that stage, he is fed a varied diet, and is no longer dependent exclusively on the nutrients contained in milk or milk feeding formulas (R. 214, 243). Consequently the evidence with respect to nutritive value concerns itself with the value of Carolene "as a Food for Infants" (R., Index, p. IV).

Even if, during this brief period of the life of a human being, defendant's product were not as desirable as milk, that would furnish scant justification for banning its sale

completely and absolutely. In truth, however, the evidence leaves no room for reasonable difference of opinion that defendant's product is as desirable as whole milk, if not more so, even for infants.

All the witnesses produced by petitioners—pediatricians and nutritional experts of the highest standing in their field, "their ability and integrity are not open to question" (Finding 53; R. 518)—testified that Carolene is as desirable as, if not more desirable than, whole cow's milk, even in the feeding of infants. (Professor Carlson at R. 106, 107 for twenty-five years Professor Carlson was in charge of the Department of Psysiology of the University of Chicago, some time president and secretary of the American Physiological Society, some time presedent of the Federation of American Biological Societies, some time president of the Institute of Medicine of Chicago, some time president of the Society of Internal Medicine, Chicago; Editor-in-Chief of Psysiological Revivews; member of the National Academy of Sciences, and chairman of a government advisory committee of the National Academy to the Department of Agriculture; member of the National Research Council; member of the Public Advisory Committee of the U. S. Public Health Service; official consultant of the Food and Drug Administration; member of the Nutrition Committee of the State of Illinois. After the last war, Dr. Carlson, at the request of Mr. Herbert Hoover, organized and administered a program for feeding undernourished children in nearly all of the war devastated areas in Europe, except Germany; Dr. Aull, Associate in Pediatrics, University of Kansas Medical School, at R. 114; Dr. Walthall, a former instructor in pediatrics there, at R. 121, 127, 131-132; Dr. Scott, a specialist in infant nutrition, at R. 134, 138, 143, 151-2; Dr. Eckles, a practicing physician, specializing in pediatrics, at R. 156; Dr. Brier, a specialist in internal medicine and allergy, at R. 156-7; Dr. Bradford, former state pediatrician of Missouri and instructor in

pediatrics at University of Kansas Medical School, at R. 171-172, 174, 175, 181; Dr. Belknap, a specialist in the diseases of infants and children for over twenty years, at R. 187, 190, 193; Prof. Stoland, of the Department of Physiology, University of Kansas, at R. 194-5; Prof. Veeder, of the Department of Clinical Pediatrics, Washington University Medical School, at R. 260-261, 266-7). The professional attainments of petitioners' witnesses other than Professor Carlson are equally impressive but are omitted for the sake of brevity.

These witnesses showed that neither whole milk nor evaporated milk is a perfect food, particularly for infants; that it is deficient in sugar, Vitamin D and minerals; that the Vitamin A content is too unstable to be dependable, because it depends on the diet of the cow, which changes with the seasons, and also on the breed of the cow; that the butter fat in whole cow's milk is irritating to the intestines of infants, and that no competent pediatrician advises the feeding of whole cow's milk or evaporated milk to infants unless the milk is diluted, modified and supplemented so as to make up the aforesaid deficiencies and render it digestable and absorbable by the human infant (R. 116, 123-4, 126, 135, 152, 163, 164, 171, 174, 177, 179, 187, 190, 194). They pointed out that Carolene is as good, if not better, than whole cow's milk in the feeding of infants; it has much more vitamin D, and at least as much A, as whole milk and, in addition, this vitamin content is constant, winter and summer; it has a higher sugar and mineral content than whole cow's milk, and does not contain the butter fat which, in milk, is irritating to the infant's intestinal tract (R. 121, 126, 129, 131-2, 136, 138-9, 143, 152, 156-7, 171, 172, 174-5, 178, 180-1, 190, 194).

Dr. Scott epitomized the testimony of all petitioners' witnesses when he said (R. 152) that Carolene:

"* * * is a wholesome food itself in nutritional value. It is a food that is better tolerated than is either whole

milk dilution or whole evaporated milk dilution and it has also the advantage of having the required content of vitamin A and D.

Q. Is there an insufficient amount of vitamin A and D in ordinary cow's milk for the infant? A. There very definitely is.

Q. An insufficient amount? A. Yes.

Q. How about evaporated milk? A. Also that.

Q. Both of them? A. Yes.

Q. Do you say that this product (Carolene) is equal to whole cow's milk in nutritional value? A. Yes."

An analysis of the evidence given by plaintiff shows that the testimony of the foregoing witnesses is not put in issue.

Dr. Hartmann, plaintiff's first witness on this subject, admitted that whole cow's milk is not an adequate food for infants; he testified that whole cow's milk satisfies the nutritional needs of an infant only (R. 203):

"• • • when supplemented with the proper supplements, extra carbohydrate in the case of infants and extra vitamins that are not there at all, or there in such small quantities or there uncertainly that one could not be sure about their presence in a satisfactory amount."

His objection was not particularly to Carolene; he felt merely that there was "no need" for introducing a new product in infant feeding, because the present products are satisfactory, and there would be a risk in using any product about which there is an absence of information: "That", he said, "is as much as I would want to say about it" (R. 209).

Plaintiff's other witness on this subject was Dr. Zentay. The most he would say is that cow's milk is ideal "with certain limitations" (R. 244-5), and that it would be unwise to substitute something "unknown".

No one questions the fact that it would be unwise, in the feeding of infants, to substitute something "unknown"

or about which there is "an absence of information". There is, however, no such risk or lack of knowledge here, because the pediatricians and nutritionists testified that the complete adequacy and desirability of products having the constituents of Carolene are incontrovertably attested by twenty-five years of experience with infant feeding (R. 114, 121, 134-137, 160-163, 168-169, 170-2, 189-191, 261-263, 268-272).

Neither Dr. Hartmann nor Dr. Zentay testified that Carolene was not a wholesome and nutritious food, or that it was in any way harmful. They had never used the product (R. 208, 247) and based their preference for whole cow's milk or evaporated milk entirely and exclusively on the results of certain experiments on rats with food containing cottonseed oil as a substitute for butter fat (R. 236, 245, 246, 247). We shall not unnecessarily extend the discussion, by referring to the lack of accuracy and reliability in these experiments, even as applied to rats (R. 256, 267-8, 366-7, 372, 384, 389, 390-2); suffice it to say that it is conceded, even by plaintiff's witnesses, that conclusions based upon nutritional experiments made with animals may not safely be applied to humans (R. 305).

Plaintiff's witness Hogan, an animal nutritionist exclusively (R. 348-9), admitted that the nutritional deficiencies in food give different manifestations, even among animals, and that in man the question must be decided "by trial and error" (R. 355-357). Plaintiff's pediatrician grudgingly made a similar admission (R. 207). Hogan agreed that insofar as the feeding of infants is concerned, he would give the experience of pediatricians over a period of 15 to 20 years more weight than rat experiments (R. 360-1). It will be recalled that among the experts who testified were several outstanding pediatricians and nutritionists who had had even longer experience, and who, basing their testimony on that experience, were emphatic that Carolene is

as good and wholesome a food as milk, if not better, even for infants.

It would be unfortunate if the foregoing discussion of the evidence concerning Carolene as an infant food were to create the impression that Carolene is represented to be, or is sold as, an infant food. We have discussed the evidence in reference to infants only because the State has attacked the sufficiency of the product in that field alone. In truth, the issue thus sought to be raised is a man of straw: Carolene is not regarded as an infant food and there is not a word of evidence that anyone ever sold it, or bought it, as such. Among the host of consumers who took the stand, not one purchased it, or used it, as an infant food (R. 411-440). Infant foods are bought in drug stores and, as a rule, on doctor's prescription (Finding 40; R. 512-3); Carolene, on the other hand, is sold in grocery stores (Finding 29; R. 507), is bought by "housewives" (See Findings 32 and 38; R. 509, 511) and the recipe book and other advertising matter distributed with it describes its uses, all of which are culinary (R. 409-411). The label on Carolene clearly and prominently states that it is "not evaporated milk or cream" and that it is "especially prepared for use in coffee, baking and for other culinary purposes" (R. 17).

The majority below were of the opinion that the statute would be constitutional as to Carolene if there were "substantial disagreement" as to whether Carolene is "inferior, equal or superior to whole milk or evaporated milk". We have discussed the evidence on that subject, only to show that there is no such disagreement. In truth, however, that is not the issue. Since Carolene is concededly a wholesome, nutritious food product, we maintain that it would be unconstitutional to ban its sale, even if there were "substantial disagreement" as to whether it is "inferior, equal or superior to whole milk or evaporated whole milk".

B.

Since Carolene is admittedly wholesome and nutritious, it would be unconstitutional to ban its sale, even if there were "substantial disagreement" as to whether it is inferior, equal or superior to whole milk or evaporated milk.

There is, we respectfully submit, a manifest fallacy in the opinion of the majority below in making the test of the legislative power to ban Carolene the existence of a "substantial disagreement" as to whether or not that product "is inferior, equal or superior to whole milk or evaporated milk".

To say that there is a substantial disagreement as to whether or not Carolene is inferior to whole milk is but another way of saying that there is a substantial disagreement as to whether or not whole milk is inferior to Carolene. Consequently, the existence of such a disagreement would be as much justification for banning milk as it would be for banning Carolene. Yet no one would argue that the Legislature could constitutionally ban the sale of whole milk because there is a "substantial disagreement" as to whether or not it is inferior, equal or superior to Carolene.

It is appropriate to note that there is no Finding by the Commissioner or the Court below that milk is good and Carolene is bad. The Findings are that both are wholesome and nutritious, but that neither of them alone contains all the nutritional elements required for a balanced diet; both must be supplemented by other foods (Findings of Fact 19, 20, 53 A; R. 502; 519).

The fallacy in the argument of the majority of the learned Court below was recognized by the State, as appears from its effort to base its case, not on the contention that Carolene is inferior to whole or evaporated milk, but on the contention that Carolene is "not wholesome and nutritious" (R. 60). In this the State failed: the Commissioner found

(Finding of Fact 53; R. 519) that Carolene is "wholesome, nutritious and harmless."

As Mr. Justice Wedell said in the minority opinion below (R. 673):

> "Every constituent element of the instant food compound is wholesome and nutritious in its natural state and that condition is in nowise altered in the process of manufacture or shipment in the original package."

(R. 674-5):

> "The only difference of opinion pertains to the extent of its nutritive value as compared with whole milk. In other words, a question of comparative nutritive value is presented.
>
> * * * * *
>
> "It is indeed doubtful whether there is any brand of food concerning which there is no disagreement as to its nutritive value when compared with other similar foods. If the power of the legislature to prohibit the sale of a product may be based upon a difference of opinion as to the comparative nutritive value of various food products then the legislature has the power to impair as well as conserve the market for dairy products. (Carolene Products Co. v. Thomson, 276 Mich. 172, 183, 267 N. W. 608.) If the legislative power rests upon such a basis, then, under the evidence in the instant case, it undoubtedly has the power to completely suppress the dairy industry by prohibiting the sale of milk altogether as there is an abundance of evidence in this record, which would support the judgment of any legislature, that the instant product is equal or superior to whole milk."

The statute here involved cannot be sustained under the cases upholding enactments which fix a nutritional standard and ban any product which fails to measure up to it. This statute fixes no standard; it bans every milk compound which contains any fat or oil other than milk fat, irrespective of how nutritious it be. If whole milk be taken, and to it be added a non-milk fat, the resultant compound is banned, even though the added fat be highly nutritious and the compound be more nutritious than whole milk. *In short, milk may be sold, but milk to which a non-milk fat has been added may not be sold, even though the added fat is, itself, nutritious, and the resulting product is superior in every way to milk itself.*

Conversely, this statute permits the sale of skim milk, which is the residue of whole milk after taking off the cream, and with it, the essential vitamins A and D; yet it prohibits the sale of that same skimmed milk if these vitamins A and D are restored to it through the medium of a fat or oil other than milk fat, and this, despite the fact that the non-milk fat so added contains no injurious or deleterious substance and creates a resultant product more nutritious than whole milk itself.

Thus the effect of this statute is to close the door to progress in the improvement of milk products by arbitrarily banning any milk product, no matter how nutritious it may be, if there be in it any fat or oil other than milk fat.

Such a discrimination is arbitrary and unreasonable; it is based on neither logic nor reason. We submit that the minority below were right in saying (R. 669):

> "This law fixes no standard of minimum nutritive value for whole milk. Milk which is permitted to be sold may be wholly inferior in nutritive value to the product the statute condemns. The law in nowise prohibits the subtraction of any of the nutritive ingredients from whole milk. It only prohibits the addition of

something. The addition which it condemns is *any* fat or oil other than a fat or oil which belongs distinctly and solely to the dairy industry. Under the clear and unambiguous provisions of this law it is wholly immaterial whether any other fat or oil which might be added is equal or highly superior in nutritive value to milk fat. Irrespective of its value it is flatly condemned by legislative fiat.

In this record it is conceded that whole milk alone is not a perfect food. Yet under this law milk may not be improved and perfected as a food of universal consumption for the benefit of the public health by adding any fat or oil unless it be a fat belonging peculiarly and exclusively to the dairy industry. Under this law skimmed milk which has its milk fat removed nevertheless may be sold to the public with vitamins A and D absent therefrom, but if those fat solubles, vitamins A and D, are added to skimmed milk in even greater and more constant quantities than are contained in whole milk itself, as is done in the instant case, the (fol. 25) product is flatly condemned. I cannot bring myself to believe the primary purpose of such a law was the preservation of the public health. If, however, that was its purpose, the law clearly is not a reasonable health measure. It is unreasonable, arbitrary and discriminatory."

The reasoning and conclusion of the minority below are in accord with the Supreme Courts of Michigan, Nebraska and Missouri, which have construed identical or substantially identical statutes and have condemned them as constituting unreasonable, and therefore unconstitutional, health measures:

Carolene Products Co. v. *Thomson*, 276 Mich. 172, 267 N. W. 608;

Carolene Products Co. v. *Banning,* 131 Neb. 429, 268 N. W. 313;

State ex rel. McKittrick v. *Carolene Products Co.,* 346 Mo. 1049, 144 S. W. (2) 153.

From the standpoint of a health measure, there would be no more justification for banning the sale of Carolene, even if it were not as nutritious as milk, than there would be for banning milk because it is less nutritious than cream, or lamb because it is less nutritious than beef. Here again, we think the logical view was stated in the minority opinion, where Justice Wedell said (R. 674):

> "Shall this law be upheld upon the principle that the legislature has the power and authority to select for the individual citizen what food he shall eat and drink because in the judgment of that body, supported by some creditable testimony, one kind or brand of food or drink is slightly superior in some respects to another food or drink, although the latter is admittedly superior in other respects? If the legislature possesses the power to determine that fact as to one food, it manifestly has the same power with respect to every food. Such power would enable the legislature to ban many common articles of commerce as, for example, syrup not all maple, shoes not all leather (*Carolene Products Co.* v. *Thomson, supra*), clothes or comfortables with shoddy in them (*Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 46 Sup. Ct. 320, 70 L. Ed. 654) and the like."

The test to be applied is not the comparative nutritive quality of two products, but whether or not the product in question is a nutritious one. Since Carolene *is* wholesome and nutritious (Finding of Fact 53, R. 519), its sale may not be prohibited, irrespective of whether milk is more or less

Petitioners respectfully submit that the evidence establishes beyond room for "substantial disagreement" that Carolene is as wholesome and nutritious a food as whole milk or evaporated milk, if not more so; but that even if there were room for "substantial disagreement" on this point, such disagreement would not justify the absolute proscription of Carolene. A product which is wholesome and nutritious—and it is admitted that Carolene is both—may not be flatly proscribed, even if it is not as wholesome as some other product, whether such other product be milk or anything else.

POINT II.

There is no claim that petitioners commit any fraud or deception in the marketing of Carolene; it is admittedly wholesome and nutritious, and is sold under labels which plainly, distinctly and accurately describe its ingredients. Any resemblance between Carolene and evaporated milk results exclusively from the inherent qualities of the indispensable ingredients of the product, and not from the addition or omission of any substance for the purpose of creating a simulation. If, notwithstanding these circumstances, further protection of the public is deemed necessary, the remedy is regulation, not prohibition.

There is no claim that either of the petitioners was guilty of fraud or deception in the sale of Carolene.

Nothing is added to or omitted from Carolene to give it artificial taste or color, or to give it a resemblance to any other food product; any resemblance to evaporated milk results solely from the inherent nature of the necessary ingredients of the product (Finding of Fact 33; R. 509).

Carolene is labeled in such a manner as to clearly show its contents (R. 17). The label plainly states that the

product is "not evaporated milk or cream", but "a compound of evaporated skimmed milk, cottonseed oil, vitamins A and D in fish liver oil". The label also clearly states that Carolene is "especially prepared for use in coffee, baking and for other culinary purposes". The label meets all questions raised, and suggestions made, by the Administrator of the Federal Food and Drug Administration (Finding 27; R. 507).

In each case of Carolene is enclosed a printed "Notice" which states, among other things: "It is improper to advertise, represent, display or sell either of these products as milk or evaporated milk or cream" (Finding of Fact 34; R. 510).

Thus it is no exaggeration to say (1) that Carolene is wholesome and nutritious; (2) that the Corporation markets the product honestly and without the slightest fraud or deception, and (3) that it does all that lies in its power to prevent others from committing any fraud or deception in the marketing of it.

Insofar as deception by others than the corporation is concerned, the Findings show that there has been very little, if any, attempt by retailers to sell Carolene as milk. The evidence is merely that *in the course of two years*—1940 and 1941—a deputy dairy commissioner called at twenty-eight stores in the whole of the State of Kansas and that in "many" of these twenty-eight stores, defendant's product was displayed "with or near evaporated milk"; that in each of the stores the deputy commissioner asked for "cheap canned milk"; in "some" of them the clerk first recommended defendant's product; in "several" instances, the clerk either first recommended some brand of evaporated milk, or some brand of evaporated milk and defendant's product, and that in "many" of these twenty-eight stores, the clerk either informed the deputy of the nature of the product or read to him from the label, but a "majority" did not disclose the "nature" of the product. The proof is

undisputed that petitioner Sage never sold the product as milk or canned milk (Finding 31; R. 508, 509, 420).

Another finding (Finding 32; R. 509) is that "most" housewives know what Carolene is, although "some" do not, and that the "majority" of them call for the product under its trade name. "Some" call for it as "Milnot milk" and "some" of the retail grocers who testified so referred to it.

The only other finding on this subject (Finding 34; R. 509-10) is that "various" retail grocers have advertised Carolene in their local newspapers on their own initiative and at their own expense, and that in such advertisements, *twenty-two* of which appeared in the course of a period of *almost two years* (R. 618-622), there appeared *six* or *seven* references to petitioner's product in which the name was linked with the word "milk".

This, it is submitted, is clearly insufficient to show that there is any appreciable misunderstanding on the part of purchasers, or deception on the part of dealers, *and it is highly significant that neither the Commisioner nor the learned Court below found that fraud or deception had been practiced.*

Assuming, *arguendo*, that an unscrupulous dealer here or there might attempt to deceive a customer by giving him Carolene when he wanted milk, the remedy lies, not in proscribing a highly nutritious and honestly labeled food product, but in the promulgation of regulations to prevent deception. Indeed, regulations already exist in Kansas. The Kansas law provides regulations to prevent deception in the sale of foods and penalties for false labelling or misbranding (Sec. 65-602, G. S. 1935); it empowers the state Board of Health to promulgate appropriate rules and regulations (Sec. 65-603, G. S. 1935); it prohibits imitation of, or offering any product for sale under the name of, any other food (Sec. 65-608, G. S. 1935), and "false, misleading

or fraudulent advertising" (Sec. 21-1112, G. S. 1935). With all of these the petitioners have scrupulously complied. If further regulation is deemed necessary, the State is, of course, free to promulgate them.

In *Carolene Products Company* v. *Banning*, 131 Neb. 429 (1936), Carter, *J.* said at pages 437, 438:

> "The contention is made that the prohibition of the sale of Carolene and like products should be upheld under the police power because it would prevent the perpetration of fraud on the public. The evidence shows that in a few cases retail grocers kept Carolene on the same shelf with condensed milk, that a few exhibited Carolene to customers who asked for milk or evaporated milk, and some retailers advertised Carolene as milk. *We cannot say that a few instances of deception on the part of retailers are sufficient to give authority to the legislature under the police power to prohibit the sale of a product. To so hold would give the legislature power to prohibit the sale of any article on the market, as all are subject to the possibility of being misrepresented.* If retailers of a wholesome and nutritious food product practiced deception in its sale, *the remedy is by regulation and not by a destruction of the business.* After a consideration of all the evidence, we fail to find that the possibilities of fraud are such as would sustain the exercise of the police power of the state in prohibiting the sale of Carolene. *The evils of which the state complains can undoubtedly be avoided by reasonable legislative regulations.*" (Italics ours.)

And in *Carolene Products Company* v. *Thomson*, 276 Mich. 172, *supra*, Fead, *J.* said at pages 180, 181 and 182:

> "The State also contends that the act may be sustained under the police power to prevent fraud, but it

fails to suggest the specific fraud to prevention of which the prohibition of the statute is reasonably related. Defendants made no showing of possibility of fraud in the sale of Carolene except that three grocers in Lansing kept the product on shelves with evaporated milk; * * * and a retailer in Grand Rapids advertised Milnut as giving 'better results than ordinary evaporated milk. A blend-evaporated.'"

* * * * * *

"*It seems incontrovertible that any possibility of fraud, sufficient in extent to be called public, in the sale of a harmless and nutritive food product may be avoided by regulations* as to branding, disclosure of ingredients, kinds and marking of containers, requirement that eating places give notice to customers of its use as is already provided for oleomargarine, 1. Comp. Laws 1929, Sec. 5374, and otherwise. Stringent, even onerous, regulations to protect milk are valid.

"Regulations of various sorts have been found adequate for the protection of the public in the sale of other milk products. There has been no attempt, by testimony or argument, to indicate that they would not be effective in the vending of Carolene, and, in view of the fact that both elements of the product are lawful objects of sale in the State, only their union is prohibited and the completed product is harmless, the remedy necessary to avoid infringement upon constitutional rights is by way of regulation, not prohibition. *Weaver* v. *Palmer*, 270 U. S. 415." (Italics ours.)

In *People* v. *Marx*, 99 N. Y. 377 (1885), the Court of Appeals held unconstitutional a statute which prohibited the sale of oleomargarine. The Court held that the object of the statute was not to protect against fraud and decep-

tion by means of imitation of butter, but to prevent the sale of any article which could be used as a substitute for it. The Court held that such a statute was violative of the due process of law clause.

In *People* v. *Biesecker*, 169 N. Y. 53, 57, 58, it is said:

> "The legislature cannot forbid or wholly prevent the sale of a wholesome article of food. * * * The sale and consumption of a well-known article of food or a product conclusively shown to be wholesome could not be forbidden by the legislature even though it assumed to enact the law in the interest of public health. The limits of the police power must necessarily depend in many instances on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge is good and wholesome."

In *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 46 Sup. Ct. 320, 70 L. Ed. 654, a statute prohibiting the use of shoddy in comfortables and mattresses was held unconstitutional. The Court declared that inasmuch as the product was a useful one, its use should not be forbidden, and that any danger incident to its use should be guarded against by regulation. Mr. Justice Butler said (pp. 414-415):

> "Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. *As against that fact, the provision in question cannot be sustained as a measure to protect health.* And the fact that the Act permits the use of numerous materials, prescribing sterilization if they are secondhand, also serves to show

that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary.

"*Nor can such prohibition be sustained as a measure to prevent deception.* In order to ascertain whether the materials used and the finished articles conform to its requirements, the Act expressly provides for inspection of the places where such articles are made, sold or kept for sale. * * *.

"* * * *Obviously, these regulations or others that are adequate may be effectively applied to shoddy-filled articles.*" (Italics ours.)

It is clear from the foregoing authorities that a wholesome and nutritious product may not be barred by legislation upon the ground that prohibition is necessary to protect the public from deception. Full protection can be given by regulation.

The majority opinion below places reliance upon the earliest of the oleomargarine cases, *Powell* v. *Pennsylvania*, 171 U. S. 1; 18 Sup. 757, 43 L. Ed. 49. The answer to that case is so appositely stated in the minority opinion below that we quote from it (R. 672-3):

"The only possible remaining basis for the law is therefore the mere possibility that the sale of the product is susceptible to fraud. If the law was intended as a health measure it must be based upon the theory of such possibility of fraud. To meet that possibility the lawmakers chose to adopt the drastic remedy of prohibiting the sale of the product entirely. The same unreasonable prohibition was at one time applied to the sale of oleomargarine. (Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 1257, 32 L. Ed. 253, [1888].) But in 1898 the Supreme Court of the United States did not leave the final decision as to the reasonableness of such drastic

legislation in the discretion of the lawmaking body. (Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49.) Every argument advanced by the state in the instant case was advanced by the state in the last cited oleomargarine case (see pages 7 and 8 of that opinion) but it was there determined:

"2. The fact that inspection or analysis of the article imported is somewhat difficult and burdensome will not justify a state in totally excluding a pure and healthy food product.

"3. A state cannot absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated, and which in its pure state is healthful, simply [fol. 28] because such article in the course of its manufacture may be adulterated by dishonest manufacturers, for the purpose of fraud or illegal gains.' (43 L. Ed. headnotes 2, 3.)

In the course of the same opinion it was further pointedly stated: "The bad article may be prohibited, but not the pure and healthful one."

In *Schollenberger* v. *Pennsylvania* case, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, the Court said at page 12:

"The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state whether it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food."

And at page 14:

"We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated article into the state.

* * * * *

"Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful; simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one."

Further at page 25:

"It cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome."

It is common knowledge that there is much deception in the sale of milk itself. Yet none would suggest that its sale could be flatly prevented on that account: the remedy there, just as it should be here, is regulation, not suppression. As stated by the minority below (R. 675):

"The instant record concedes that milk alone is deficient as a diet but certainly that fact should not justify the complete suppression of its sale. Certainly its sale is susceptible to deception. It is common knowledge that there is probably as much, if not more, deception in

the sale of milk and cream by means of dilution than in the sale of any other single food product of universal consumption. The dairy industry, however, has not been suppressed. On the contrary [fol. 30], it often has been regulated in the minutest details and in most instances properly so. Owing to its important relation to the public welfare it has been regulated even to the extent of fixing the price of milk. (Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940.)

"What reasonable basis is there for believing the public cannot be protected adequately by regulation of the sale of this product? The state, in substance, insists the legislature is the judge of the reasonableness of its own acts and that if there exists any basis for completely prohibiting the sale of a healthful product, which seems reasonable to that body, courts are powerless to interfere. If a mere difference of opinion as to the comparative nutritive value of foods constitutes a reasonable basis for permitting the sale of one food and prohibiting the sale of another, courts have little, if any, practical function left to perform in protecting the constitutional guaranty of a citizen's right to engage in a legitimate business."

The State offered no evidence which proves that regulation would be impracticable as an administrative matter. The State Dairy Commissioner testified merely that the Babcock test would not determine whether the fat in a product such as Carolene was butter fat or vegetable oil, but this limitation of the Babcock test creates no issue. Defendants' proof showed that the ingredients of its product are quickly and accurately identifiable by tests well known to, and regularly used by, both Government and private laboratories (R. 445-7, 451), and the Commissioner found that any competent food chemist could readily determine

the type of fat in a product such as Carolene; he found further that the Corporation has assays made from time to time by a competent disinterested chemist and copies of such reports are made available to State authorities. He also found that like assays are made by the Federal Food and Drug Administration (Finding of Fact 49; R. 515-16). The findings of the Commissioner put that question at rest. The only other evidence offered by the State was the obviously reckless statement of the State Dairy Commissioner (R. 450) that it would take "an army of men" to "check up on the thing". Obviously it would take no more men "to check up on the thing" than it takes to supervise the due observance of a thousand and one other regulations pertaining to the purity and sale of foods. The State may not save itself the labor involved in such supervision by banning the sale of a wholesome food product.

There is, therefore, no basis for the claim that regulation would entail administrative difficulty, although this Court has held that even such difficulty would not justify the proscription of a wholesome and nutritious product. In the language of the headnote in the *Schollenberger* case (171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, headnote 2):

> "The fact that inspection or analysis of the article imported is somewhat difficult and burdensome will not justify a state in totally excluding a pure and healthy food product."

The majority below relied on *Hebe* v. *Shaw*, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255. The *Hebe* case was decided by a divided court, three justices dissenting, and is clearly distinguishable from the case at bar. The *Hebe* case dealt with a statute of Ohio which made it a criminal offense to sell condensed milk made of milk from which the cream had been removed. Such a product was, by the terms of another Ohio statute to which the Court there referred

(248 U. S. at pp. 302-3), condemned as an "adulterated" product and, in the light of scientific knowledge at that time, the nutritional deficiencies caused by the removal of the cream were irremediable. Even though the resultant product was assumed to be wholesome and nutritive, it did not have, and, as far as was then known, could not be endowed with, certain essential nutrients which were carried off with the cream, and the product would, necessarily, be an "inferior product". So the Court described it in the *Hebe* case (248 U. S., at p. 302). What was there decided, as this Court subsequently pointed out (*U. S.* v. *Carolene,* 304 U. S. 144), was that the legislature had power (p. 148)

> "to secure a minimum of particular nutritive elements in a widely used article of food to protect the public from fraudulent substitutions * * *."

The Kansas statute here under consideration was obviously not designed to do, and does not even purport to do, any such thing. It makes no pretense of insuring any minimum of particular nutritive elements: it permits the sale of skimmed milk alone, while prohibiting its sale if compounded with another substance which concededly increases its nutritional value; indeed it prohibits the sale of even whole milk of the finest quality, if there be added to it an oil or fat other than milk fat, notwithstanding that the resultant compound be in every respect more wholesome and nutritious than milk itself. Such a statute is not one "to secure a minimum of particular nutritive elements" or to protect the public against the fraudulent substitution of an "inferior product", as the statute involved in the *Hebe* case was. Furthermore, the decision in the *Hebe* case was modified and limited by the later decision of this court in *Weaver* v. *Palmer, supra,* pages 29-30. See also: *Carolene Products Co.* v. *Thomson,* 276 Mich. 172.

The State relied below on *State, ex rel. Carnation M. P. Company* v. *Emery*, 178 Wis. 147, in which the Wisconsin Supreme Court held the Filled Milk Act of that State constitutional. That case, however, as the learned Court below noted in its opinion (R. 666), was later overruled by *John F. Jelke Co.* v. *Emery*, 193 Wis. 311, in which a statute prohibiting the manufacture of oleomargarine was held unconstitutional upon the ground that the Legislature did not have the power to outlaw a wholesome and nutritious article of food. In the *Jelke* case the Court said of the Wisconsin Act, at pages 318, 323:

> "It prohibits the carrying on of a legitimate, profitable industry and the sale of a healthful, nutritious food.
>
> * * * * *
>
> "* * * *the legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef-cattle industry or to prohibit the manufacture and sale of cement for the benefit of the lumber industry.*" (Italics ours.)

United States v. *Carolene Products Co.*, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234, several times cited in the majority opinion below (R. 661, 662, 666) is not in conflict with the foregoing authorities. Although the Federal Filled Milk Act was held constitutional in that case, the result followed only because the defendant there, by its demurrer, admitted for the purpose of that case that the product there involved was "an adulterated article of food" injurious to public health, and a fraud upon the public. This, as the Court pointed out, left for decision only the question whether or not Congress has power to prohibit the shipment of such an article of food in interstate commerce. The question now presented is an entirely different one, affected in no way by

the earlier decision. There is here no admission that the petitioner is selling "an adulterated article of food injurious to the public health" but, on the contrary, a record which shows, and a Finding which holds, that the product is wholesome and nutritious.

The rule deducible from the authorities is well stated in 11 Am. Jur., Sec. 281, page 1041, as follows:

> "In any event such fraud-preventing regulations must be reasonable, and if regulation alone will afford the requisite protection, absolute prohibition is unconstitutional."

Another statement of the principle is found in Section 291 of 11 Am. Jur., page 1056, as follows:

> "It is a fixed principle that the legislature cannot forbid any person or class of persons from engaging in a lawful business not injurious to others, and a citizen who is willing to comply with all the reasonable regulations which may be imposed upon a calling, occupation, or business which is not necessarily injurious to the community cannot be deprived of his right to pursue it."
>
> * * * * *
>
> "The legislature may regulate when regulation will protect, but may not suppress when inhibition will injure the party pursuing the lawful vocation, and proper regulation will prevent injury to others."

The words of Justice Wedell, in the minority opinion below (157 Kan. 404, at 430) may appropriately be repeated here:

> "I am, however, unwilling to see constitutional guaranties of the citizen's right to engage in a legitimate

business whittled away when there is no reasonable basis for believing that the public welfare probably could not be protected adequately by regulation of the business. It is not only important that the constitutional guaranty to the citizen to transact a legitimate business should be zealously protected by the courts. It is also most vital that the public should not be deprived of its right to purchase a desirable and healthful article of food which scientific research and discovery have made available to the public at a low cost and in a form easily preserved by the citizen in the lower income groups who is not blessed with refrigeration facilities."

The record in this case brings out the serious shortage that confronts the nation in both butter and milk. With the nation facing such conditions in its food supply, the necessity for rescuing, for consumption as human food, the billions of pounds of skimmed milk now wasted is a matter of vital public concern.

Needless to say, we are not contending that in times of food shortages the public health should be endangered by the marketing of articles of food that are detrimental to public health. Our contention is that, even under normal economic conditions, when food as well as other articles of convenience are plentiful, the right of the mass of the public to purchase and enjoy articles for which there is a popular demand, and which are useful and nutritious, outweighs any supposed right to absolutely prohibit their sale because of the possibility that occasionally a member of the public may be deceived or misled into buying such an article when he believed he was buying a similar article. A fortiori in times like these.

The sale of plain skim milk being entirely legal, there is no reasonable basis for prohibiting the sale of skim milk

whose nutritional value has been increased, merely because the increase has been accomplished by the addition of a wholesome non-milk fat, rather than a milk fat. If, in the sale of such an article, it is deemed necessary to protect the public from innocently mistaking it for something else, the method to be employed is regulation, and not proscription.

CONCLUSION.

This record presents the question of the constitutionality of the Kansas Filled Milk Law, as applied to Carolene.

The statute is not a regulatory measure: it fixes no standards of nutrition, compliance with which permits a product to be sold. On the contrary, it bans the sale of any milk compound in which has been incorporated a fat or oil other than butter fat, irrespective of how nutritious the compound may be: it may not be sold though it be more nutritious than milk itself.

The State was not oblivious of the difficulty of sustaining such an enactment as that: it undertook to prove, not merely that Carolene contains a fat or oil other than butter fat—which is all it would have had to prove if it were content to rely on the statute—but that Carolene (R. 60):

> "* * * is not wholesome and nutritious regardless of the type of oil or fat that is substituted for butter fat."

If that had been proved a different case would be here; but it was not proved: indeed, no effort was made to prove any such thing, and the finding is (Finding 53, R. 519) that Carolene

> "* * * is wholesome, nutritious and harmless * * *."

The State having failed to show that Carolene is not wholesome and nutritious, it shifted to the claim that Carolene is not as nutritious as whole milk or evaporated

whole milk. Nothing in the statute creates any such standard, and, as a matter of common sense, no such standard could be sustained: a product which is nutritious may not be banned merely because it is not as nutritious as some other. If such test could be applied, it would be competent for the legislature to limit us to a regimen consisting of half a dozen foods—the one having the highest nutritional value in each of the five or six dietary essentjals.

But passing for the moment the erroneous conception that the legislature may ban a food, no matter how nutritious it may be, if only some other be more so, we come to the proof of even this feigned issue.

What do we find?

All the experts, plaintiff's as well as defendants', agree that from the age of four months it would make no difference whether a person were fed whole milk, evaporated whole milk or Carolene. By that time his diet has become so varied that the nutritional deficiencies in any of them—and even whole milk is deficient—are made up by the nutrients in other items in his diet.

Thus, even the feigned issue is reduced to the question whether or not Carolene is as nutritious as whole milk or evaporated whole milk for infants up to four months. Surely a nutritious food cannot be flatly proscribed, because, in consequence of prejudice based only on speculation, rather than on demonstrable fact, another food is thought more desirable for the feeding of infants during the first four months of life.

But even in this short period, neither milk nor evaporated milk was shown to be better than Carolene.

Even whole milk is not an adequate or safe diet for the infant under four months: it is deficient in sugar, minerals and vitamins, and these deficiencies must be supplied from other sources; moreover, the butter fat in milk is irritating

to the intestines of an infant in these early months. On these points there is no disagreement.

Every witness called by defendants—and they constituted the most distinguished men in the country in their fields—was emphatic that Carolene is at least as nutritious as whole milk, if not more so, even in the diet of infants under four months of age. It has the vitamins which are lacking, or are unstable, in milk, the irritating butter fat is not present, and the sugar and minerals are present in greater quantity than in milk.

The State called only two pediatricians, and it is highly significant that neither of them claimed he had any evidence to justify the conclusion that Carolene would be in any respect harmful, even to an infant.

The most these two pediatricians would say was that they would not recommend the substitution of Carolene for whole milk or evaporated whole milk in the feeding of infants under four months of age, without fifteen to twenty years successful experience in the feeding of such infants.

No one criticizes them for that; but even though they may not have had such experience, others did. The witnesses called by defendants testified that they and others had been using compounds containing a cottonseed oil substitute for butter fat—which is just what Carolene is—in the feeding of infants under four months of age for twenty to twenty-five years, and that they had found it as good as, if not better than, milk itself.

But that is not all: the most significant thing about the testimony of the pediatricians called by plaintiff is that they questioned the use of a cottonseed compound in the feeding of infants exclusively on the alleged results of a few experiments on rats! These experiments were far from accurate and complete, as even one of the experimenters admitted. Moreover, plaintiff's own nutritionist admitted that nutritional experiments on animals are not dependable guides as to the results on humans, and that in humans the only route is that of "trial and error". That route, as de-

fendants' experts showed without contradiction, has been traversed here, and it demonstrates with scientific accuracy that, regardless of what inconclusive rat experiments may have shown, a cottonseed oil substitute for butter fat in a milk compound diet for infants under four months of age is as nutritious, if not more so, than whole milk or evaporated whole milk.

The learned court below applied the same erroneous test as the State sought to apply—with this qualification, that whereas the State set out to prove that Carolene is unwholesome and then changed to the claim that it is not as nutritious as whole milk or evaporated whole milk, the Court below put its judgment on a ground even more restricted and less justifiable: it held that the statute is valid because there is a "substantial disagreement" as to whether Carolene is "inferior, equal or superior to whole milk or evaporated whole milk".

That criterion, we submit with great respect, is utterly unsupportable: a substantial disagreement as to the relative nutritional value of two food products cannot justify the proscription of either, where, as here, both are concededly nutritious. To say there is "substantial disagreement" as to whether milk is better than Carolene is but to say that there is substantial disagreement as to whether Carolene is better than milk. If such a disagreement could support the approval of milk and the proscription of Carolene, it could, by the same token, support the approval of Carolene and the proscription of milk—a conclusion so obviously untenable as to explode the premise.

That an unwholesome product deceitfully sold as another, and wholesome, one, could constitutionally be proscribed is a proposition which need not be argued here, because it is not here. Carolene is admittedly not unwholesome.

Nor is it deceitfully sold by defendants. There is no dispute that the corporation honestly and plainly labels the

it is admitted that the corporation does everything in its power to prevent deceit in the resale of the product by those to whom the corporation sells it.

The evidence is convincing and undisputed that the honesty and fair dealing which attends the sale of the product by the corporation to its dealers are observed by the dealers in their resale of the product to the consumer. With all the facilities at its command, and after two years of investigation throughout the whole of the State of Kansas, the plaintiff was able to point to but a few instances in which a dealer had referred to Carolene as "milk"! And even this was without defendants' knowledge.

Does the fact that in a few isolated instances, over a period of years, a dealer here or there misrepresented the product without the manufacturer's knowledge, justify the absolute proscription of its sale?

Under the recent decisions of this Court, the answer to that question is clear: a wholesome and nutritious product which may be the subject of misrepresentation by retailers is a fit subject for regulation, but its sale may not be banned. Proscription in such circumstances is unnecessary, unreasonable and discriminatory, and an unconstitutional interference with the right to engage in a legitimate and useful business.

The judgment appealed from should be reversed and the petition dismissed.

Respectfully submitted,

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